

tiff in this matter, and the House in that case disapproved *Dawnays Ltd. v. F.G. Minter Ltd.*,<sup>(12)</sup> in any event *Dawnays* was decided on the basis that it was not permissible to deduct claims which were unliquidated and still in dispute, which is not the case here. The damages claimed by the plaintiff for the delay were capable of quantification under the terms of the agreement in accordance with the provisions of rule 12(1)(r) of the Rules and cannot be in dispute if clause 32 of the agreement is of no effect.

For the above reasons we would dismiss the defendant's appeal.

As regards the plaintiff's cross-appeal from the decision of the learned Judicial Commissioner dismissing her claim under head (b) i.e. her claim for loss of rent which she would have received for the shophouse had it been completed within the time stipulated in the agreement, in our judgment the learned Commissioner was right, and we would accordingly dismiss the cross-appeal. We agree with him that there was insufficient evidence to justify the plaintiff's claim.

Before us, Mr. Sethu argued that there was no need at the stage of the trial for him to bring sufficient evidence, as he had asked during the course of his submission in the High Court that if there was a basis for his claim the matter of damages be referred to the Registrar for evidence and determination. We do not think it necessary to consider this argument, because in our judgment paragraph (r) of rule 12(1) covers this head of claim. The paragraph specifically deals with the indemnity to be paid to the purchaser "for any delay in the delivery of the vacant possession of the housing accommodation ... the amount of indemnity ... to be calculated from day to day at the rate of not less than eight per cent per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale." In our judgment, this is intended to be comprehensive — and precludes the purchaser from recovering under any other head damages in the event of delay in delivery as happened here.

To sum up — we dismiss the defendant's appeal with costs.

We also dismiss the plaintiff's cross-appeal with costs.

*Appeal dismissed;  
Cross-appeal dismissed.*

Solicitors: Mohamed Akhbar & Partners; Azman Davidson & Co.

## A HO SHEE CHIT & ANOR. v. BRUUSGAARD KISTERUDS SKIBSAKSJESELSKAP & ANOR.

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid FJJ.)  
March 2 & 26, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 60 of 1978]

*Practice and procedure — Appeal — No grounds of judgment of trial court — Notes of counsel — Whether admissible — Rules of the Federal Court, 1980, rr. 62(4) & 68.*

In this case there was a dispute between the two plaintiffs (respondents) and the two defendants (appellants) and the learned trial judge gave oral judgment against the defendants. The defendants appealed but the grounds of judgment of the learned trial judge were not available. Counsel for the plaintiff in the High Court made notes of what the learned judge said and application was made for the affidavit of counsel containing the notes to be received by the court.

**Held:** in the circumstances of the case, the affidavit of counsel would be received, but first it should be shown to counsel who appeared for the other side at the trial to give him an opportunity to comment and then it, together with the comment, if any, should be submitted to the learned judge for his comment. The affidavit of counsel containing his note, the comment of counsel on the other side and the learned judge's comment, if any, should then be made available for the use of the appeal court.

*Cases referred to:-*

- (1) *Tan Kim Leng v. Chong Boon Eng* [1974] 2 M.L.J. 151.
- (2) *Earl De La Warr v. Miles* 44 L.T. 487.
- (3) *Thompson v. Andrews* [1968] 1 W.L.R. 777.
- (4) *Pitman v. Southern Electricity Board* [1978] 3 All E.R. 901.
- (5) *Malins v. Price* 41 E.R. 757.
- (6) *Cattell v. Corral* 160 E.R. 763.
- (7) *Sims v. Wilson* [1946] 2 All E.R. 261.
- (8) *Hayman v. Rowlands* [1957] 1 All E.R. 321.
- (9) *Bruen v. Bruce* [1959] 2 All E.R. 375.

[The following case was also cited in argument:— *In re Mc Connell* (1885) 29 Ch. D. 76.]

FEDERAL COURT.

V.K. Palasuntharam (S. Kulasegaran with him) for the appellant.

V.P. Pradhan for the respondent.

*Cur. Adv. Vult.*

**Suffian L.P.** (delivering the judgment of the Court): There was a dispute between the two plaintiffs (respondents before us) and the two defendants (appellants), the matter came before the court and on April 21, 1978, the learned trial judge gave oral judgment against the defendants.

The defendants appeal, but unfortunately we do not have the grounds of the learned judge's judgment.

Mr. Peddie who was counsel for the plaintiffs in the High Court made notes of what the learned judge said prior to delivering judgment, and Mr. Pradhan for the two plaintiffs apply for the affidavit of Mr. Peddie containing those notes to be received by us. Mr. Palasuntharam for the defendants oppose the application.

So the question is whether or not we should receive Mr. Peddie's affidavit. It is agreed by Mr. Pradhan that if we do, the notes should first be submitted to the learned judge for his comment before we proceed to hear arguments on the merits of this appeal.

Under the old rules, the Federal Court (Civil Appeals) (Transitional) Rules, 1963, published on September 26, 1963, as L.N. 242, appellants had difficulty about proceeding with their appeals if no grounds had been furnished by the trial judge, for rule 19(4)(a) provided that the appeal record should contain among other things:

"(e) the certificate, if any, given by the judge of the grounds of his judgment or order or, if a written judgment was delivered, a copy thereof."

See *Tan Kim Leng v. Chong Boon Eng*.<sup>(1)</sup>

To remove this difficulty the new Federal Court Rules, 1980, published as P.U.(A) 33, on February 7, 1980, have been differently worded, to make it quite clear that an appeal may proceed when no grounds have been supplied. Rules 68 and 62(4) thereof are relevant. Rule 68 provides:

"On the application of [the appellant, the trial judge] who gave [the judgment appealed from] shall, unless the judgment was written, certify the grounds of such judgment...; but delay or failure to so certify shall not prevent the appellant from proceeding with his appeal."

Note the proviso beginning with the word "but".

Rule 62(4) provides that the written judgment or the grounds thereof must be included in the appeal record prepared for the use of our court, but this is again subject to a proviso:

"provided that the absence of the written judgment or grounds of decision shall not prevent the appellant from proceeding with his appeal."

Cases were cited from England on the procedure in an appeal to the Court of Appeal where there are no grounds. One provision cited is Order 59 rule 12 (previously Order 58 rule 11) which reads:

"12. Where any question of fact is involved in an appeal, the evidence taken in the court below bearing on the question shall, subject to any direction of the Court of Appeal, be brought before that court as follows:—

- (a) in the case of *evidence* taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed.
- (b) in the case of *evidence* given orally, by a copy of so much of the transcripts of the official shorthand note as is relevant or by a copy of the judge's note, where he has intimated that in the event of an appeal his note will be sufficient, or by such other means as the Court of Appeal may direct."

We do not think that decisions on this provision help — for it deals with notes of *evidence*, whereas here we are concerned with notes of *judgment*. These decisions are: *Earl De Le Warr v. Miles*,<sup>(2)</sup> *Thompson v. Andrews*,<sup>(3)</sup> *Pitman v. Southern Electricity Board*.<sup>(4)</sup>

Two old cases cited, *Malins v. Price*<sup>(5)</sup> and *Cattell v. Corral*<sup>(6)</sup> are also not relevant because they too deal with evidence, not judgment.

The provisos to our new Federal Court rules 68 and 62(4)(e) make it clear that the intention is that an appeal should be allowed to go on even if no grounds of judgment have been supplied by the learned trial judge. In our judgment, nothing in the new rules prohibits us from looking at the affidavit of Mr. Peddie, who is after all an officer of the court, if that should serve the cause of justice.

In the Weekly Notes of April 10, 1943, at page 80, there appears this Practice Note:

"C.A.

Mar. 31

#### PRACTICE NOTE

Appeal — Court of Appeal — County court — County court judge's judgment — Counsel's note.

On an appeal from a county court in which no shorthand transcript or other note of the judgment of the county court judge was available for use of the Court of Appeal.

SCOTT L.J. said that the court had been furnished with notes of the judgment of the county court judge which had been taken by counsel briefed in the action. That was a very proper procedure and was to be commended. He wished to point out that it was the duty of counsel always to take a note of a judgment, and, if there was no other note available for the purposes of an appeal, the note taken by one of the counsel, or both of them, if they both had taken notes, should be available for the use of the Court of Appeal. If the notes of counsel agreed it would not be necessary that both notes should be supplied to the court, but if they differed counsel should endeavour to agree on what the judge had actually said."

In *Sims v. Wilson*<sup>(7)</sup> Morton L.J. said at page 264:

"This brings me to a matter on which it might be useful if I said a few words. In the present case there was no agreed note of the judgment of the county court judge, although it is quite plain from what we are told that he did deliver an oral judgment. We are informed by the associates that in a case before this court on March 30, 1943, SCOTT, L.J., said this (see Practice Note, (1943) W.M. 80(2)):

"It is the duty of counsel to take a note of the judgment in the court below, and, if no note of the judgment is taken by the judge for the purpose of an appeal, counsel's note should be available, for the use of the Court of Appeal in addition to the judge's note of evidence."

I respectfully agree with that observation and I would add this to it. If, as in the present case, the parties are represented by solicitors in the county court and the county court judge delivers an oral judgment giving reasons for his decision, the solicitors should take the best note that they can take of the judge's observations and an endeavour should be made to have an agreed note for the use of the Court of Appeal. If it is found impossible to agree a note, such notes as are made by the respective solicitors should be available for the use of the court."

In *Hayman v. Rowlands*<sup>(8)</sup> Denning L.J., as he then was, said at page 322:

"An application has been made to us to receive an affidavit from a solicitor as to what happened in the county court. The judge's note contains a statement of the evidence given before him but no note of the reasons for his decision. It has been submitted by counsel for the plaintiff that we ought not to look at his affidavit. He refers to the rule of this court (R.S.C., Ord. 58, r. 18(5)) which says that the judge's note has to be furnished and in default of production of such a note —

'the Court of Appeal may hear and determine the appeal upon any other evidence or statement of what occurred before the judge of the county court which appears to the Court of Appeal to be sufficient.'

He says that here there is the judge's note, and that therefore we ought not to look at any other evidence or statement. I think that the rule only applies when there is a complete and full note by the county court judge. If his note is not complete and is only a part of a note, then we habitually allow it to be supplemented by the note of counsel or by any other means which appears to us to be suitable. So in a case where counsel were not engaged, such as the present case, an affidavit from the solicitor concerned can be received. It ought to be submitted to the county court judge before hand, for his comments, especially if there is any difference. That has not been done in this case; but I do not think we need stand the case over for that to be done. The affidavit has been in the hands of the other side for nearly three weeks

now, and if they had anything to query in it they ought to have queried it before now.

I think, therefore, that we should receive this affidavit."

In *Bruen v. Bruce*<sup>(10)</sup> Hodson L.J., as he then was, said:

"I desire to say a word on another matter which has arisen in this case. There was no note of the learned judge's reasons for his decision and, as is common practice, counsel's note was written out and agreed with the other side. Unfortunately it was not submitted to the learned judge before the appeal came on for hearing, so that he had no opportunity of checking it. I desire to draw attention to the terms of R.S.C., Ord. 58, r. 18(15), which this court has previously done in *Hayman v. Rowlands*<sup>(11)</sup> (1957) 1 All E.R. 321. It is, I think, convenient, where there are only notes of evidence and no notes of the learned judge's judgment, except a very brief note, that counsel's note should be used only after it has been submitted to the learned judge."

*Halsbury's Laws of England*, 4th edition, volume 3, page 622 on the duty of barristers says:

"Counsel on each side should take a note of the substance of the... judgment for the information of the appeal court in the event of an appeal."

From the above, we would draw the following conclusions: while our rule 68 places on a judge who has given oral judgment the duty of "certifying in writing the grounds" of his judgment, nevertheless it is eminently desirable for counsel to take a note of the judgment, especially if his client is likely to appeal in case judgment goes against him. If his client is anxious to have the appeal disposed of early, counsel should refer the note first to counsel on the other side and then to the trial judge for his comment, if the note is agreed. It is desirable that this reference be made as soon as possible, otherwise he might forget. If the judge certifies the agreed note as a true record of the grounds of his judgment, it may be treated as the written certificate of his judgment within rule 68. If he does not, counsel's affidavit made available for our use should contain a note made by him of what was said by the learned judge when delivering judgment and the judge's comment thereon, and counsel for the other side should be free to make whatever comment he thinks fit during the course of argument on the merit.

If counsel for the other side does not agree with the note, the note and his comment on it should be referred to the trial judge for his comment; and the note and the comments of both counsel on the other side and the judge should be made available to help us.

If both counsel took a note of the judgment, it is desirable that they be shown each other's note. If they agree, the agreed note, and if they do not agree, the note taken by each counsel should be submitted to the judge for his comment. In either case the agreed note or the notes of each counsel and the judge's comment should be made available for our use.

The above notwithstanding, we would emphasize that the best aids that can be provided for our use are grounds written by the trial judge himself.

In the circumstances of this appeal, we would receive Mr. Peddie's affidavit, but first it should be shown to Mr. Palasuntharam who appeared on the other side at the trial to give him an opportunity to comment, and then it, together with his comment if any, be submitted to the learned judge for his com-

ment. Mr. Peddie's affidavit containing his note, Mr. Palasuntharam's and the learned judge's comment, if any, should then be made available for our use.

We will fix a date for hearing arguments on the merits, after we have been informed that action has been completed in accordance with our direction.

*Order accordingly.*

Solicitors: *Skrine & Co.; Ranjit, Thomas & Kula.*

## EU FINANCE BERHAD v. LIM YOKE FOO

C [F.C. (Lee Hun Hoe C.J. (Borneo), Hashim Yeop A. Sani & Abdoolcader JJ.) March 25 & 31, 1982]  
[Kuala Lumpur — Federal Court Civil Appeal No. 2 of 1981]

*Land Law — Order of sale made by Collector of Land Revenue — Error in order — Power of Collector to correct error or to postpone sale — No power to cancel order and issue a fresh order of sale — Second Order a nullity — National Land Code, ss. 33, 261, 262, 263, 264, 266, 417 & 418.*

D In this case the respondent had charged certain lands as security for a loan in favour of the appellant. The appellant took steps to enforce the charge in default of payment and the Collector of Land Revenue after enquiry made an order for the sale of the lands by public auction, specifying the amount due to the appellant at the date of the order as \$443,694.52 and fixing the reserve price at \$507,000. By an error only 12 instead of 20 titles were set out in the Schedule. E The Collector acknowledged the error and confirmed that the first order covered all the 20 titles. The respondents filed a notice of appeal against the order and the Collector then purported to cancel the sale. The appeal was later withdrawn and the appellant requested the Collector to proceed with the sale. The then Collector of Land Revenue (who had succeeded the earlier Collector) purported to make and issue another order of sale, specifying the amount due to the appellant as the same as that stated in the first order but F fixing the reserve price at a higher figure of \$562,000 and scheduling all the 20 titles. Subsequently the Collector informed the appellant that he had cancelled the sale as the respondent had paid to him the sum specified in the order. The appellant protested and asked the Collector to fix a new date for sale. The respondent issued a writ claiming the release and delivery of the issue documents of title. The appellant counterclaimed for a declaration that the first order was still subsisting and claimed the sums due and outstanding G including interest. The learned trial judge gave judgment for the respondent and dismissed the appellant's counter-claim. The appellant appealed.

Held: (1) as soon as the Collector made the first order under section 263 of the National Land Code he was *functus officio* save as to his power under section 264(3) to postpone the sale ordered or to formally rectify the first order within the purview of section 33 with no power to make another or subsequent order of sale under section 263;

(2) the second order on which the respondent relied was no order at all and was a nullity and devoid of any effect;

(3) the judgment of the trial judge must therefore be set aside and a declaration made that the first order was still subsisting and of full legal effect;

(4) the appellant was entitled to payment of his claim with accrued interest in satisfaction of his claim under the charge.

Cases referred to:-

- (1) *Harkness v. Bell's Asbestos and Engineering Ltd.* [1967] 2 Q.B. 729, 736.
- (2) *Birmingham (Churchwardens and Overseers) v. Shaw* (1849) 10 Q.B. 868, 880; 116 E.R. 329.
- (3) *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18, 34.